Nos. 460-461

In the Supreme Court of the United States

OCTOBER TERM, 1942

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN ASSOCIATION OF BELL TELEPHONE EMPLOYEES

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Fifth Circuit entered on July 30, 1942, setting aside and refusing to enforce an order issued by the Board against the Southern Bell Telephone and Telegraph Company (R. 210–211).[1]

[1] The judgments were entered in two separate proceedings under Section 10 (f) of the National Labor Relations Act

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 202–210) is reported in 129 F. (2d) 410. The findings of fact, conclusions of law, and order of the Board (R. 164–196) are reported in 35 N. L. R. B. 621.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on June 30, 1942 (R. 210–211). An order extending the time within which to file a petition for writs of certiorari for fifteen days from September 30, 1942, was signed by a Justice of this Court on September 23, 1942 (R. 213). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

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for review of the Board's order, instituted respectively by Southern Bell Telephone and Telegraph Company (R. 10–20) and by Southern Association of Bell Telephone Employees (R. 1–4), a labor organization found by the Board to be company-dominated. In its answer to the petition of the Company, the Board requested enforcement of its order (R. 22–26). Pursuant to stipulation of the parties (R. 212–213), the printed record for purposes of the petition for certiorari consists of the volume entitled "Transcript of Record" which also contains the proceedings in the court below, referred to herein as "R"; and the appendices to the Board's brief and the Company's brief in the court below, respectively referred to herein as "B. A." and "C. A." References to unprinted portions of the stenographic transcript of testimony and the Board's exhibits will be referred to as "Tr." and "Bd. Exh.", respectively.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the finding of the Board that the Southern Bell Telephone and Telegraph Company dominated, interfered with, and supported a labor organization of its employees. A subsidiary question encompassed in this inquiry is whether the Board might treat as evidence of company domination and support of the labor organization the fact that it is a continuation of an admittedly company-dominated union which was never disestablished.

2. Whether, upon the Board's findings of domination, interference, and support, it might properly require the Company to withdraw all recognition from and completely disestablish the organization as a collective bargaining representative of its employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings the Board issued its findings of fact, conclusions of law, and order (R. 164–196). The pertinent facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

Southern Association of Bell Telephone Employees (hereinafter called the Association) was established in 1919 under the sponsorship of Southern Bell Telephone and Telegraph Company (hereinafter called the Company) (R. 170, 187; R. 60, 65). Until passage of the Act on July 5, 1935, it was entirely maintained by the Company's financial support and assistance (R. 170, 187–188; R. 60, 65, B. A. 4, 7–8, 9–10).[3] The Association operated through locals established in the Company's offices in the nine Southern States through which the Company's operations extend (R. 169, 170; R. 46, 59, 64, B. A. 15, 25–26, 66).

In April and May 1935, in anticipation of passage of the Act, officers of the Association conducted a company-wide canvass of the employees, the announced purpose of which was to secure funds with which the Association or a like successor could operate after the Act went into effect (R. 170–171; B. A. 3–5, 14–15, 38–40, 63–66). The Company openly approved and supported the canvass by granting Association solicitors leaves of absence with pay, paying their travelling expenses, and making available to them Company automobiles, premises, time, and other facilities; at least one supervisor directly participated in the solicitation (R. 171, 178–179; R. 61, B. A. 4–5, 15–16, 29–30, 31–32, 38–40). The campaign re-

[3] Company counsel admitted at the hearing that up to the date of the Act, the Company "occupied a relation" to the Association that is "prohibited by the Wagner Act" (Tr. 440).

sulted in a fund of approximately $5,000, part of which was received by the Association after the Act was in effect (R. 171, 178; B. A. 8, 63, 67).

A few weeks after the passage of the Act, the Company, through its supervisors, orally advised the employees of their rights under the Act and of the Company's intention to pursue a "hands-off" policy (R. 172; B. A. 10–11, 27–28, 43–45, C. A. 47–51, 55). About the same time, however, the Company distributed to the employees a written notice entitled "Memorandum—Wagner Bill Interpretations," which explained that while the Company was required by law henceforward to withdraw certain items of financial support and assistance of the Association, it would continue to furnish the Association certain other direct and indirect financial aid (R. 172–174; B. A. 45–46, 70, C. A. 49–50).[4] The Board found that this notice "announced an assumption on the part of the [Company] that the Association would continue to exist and function" (R. 178). The Board further found that the partial withdrawal of financial support and the oral remarks of the supervisors did not restore freedom of choice to the employees, when these were considered with the concurrent written notice, the failure to withdraw recognition of the Association, and the failure to disavow the recent assistance to the Association in collecting funds with which to perpetuate itself (R. 178–179).

[4] The Company furnished this aid to the Association until 1937 (*infra*, p. 8).

In August 1935, officials of the Association, utilizing the above-mentioned funds, reorganized the Association under the same name and with largely the same leadership as before, but under a revised constitution (R. 174–177; B. A. 8–9, 13–14, 16–17, 25–26, 63–69, 73–74, 75).[5] Everything which was said and done in connection with the reorganization deliberately emphasized to the employees the continuity between the old and the revised Association. Thus, the revised constitution recited, *inter alia*, that the Association had been formed in 1919, that it had been in "continuous operation" since that time, and that the document constituted a "revision * * * superseding" previous revisions of the constitution, the last of which became effective in May 1934 (R. 175–177, 180; B. A. 75). Similarly, the employees were repeatedly reminded by the Association officials, while adherence to the organization in its revised form was being solicited, that the officials were engaged merely in revising the old Association, and they were told that membership applications which they were asked to sign were intended to evidence their desire "to continue" their membership in the Association and

[5] After he had taken a leading role in initiating the reorganization, Askew, the president, resigned and was succeeded by the vice president; Askew continued, however, as a member of the Association until 1939 when he resigned because he was considered by the employees to be a supervisory employee (R. 171 fn., 174; B. A. 3, 9, 13–14, 17).

were not to be regarded as "new" applications for membership (R. 175–177; B. A. 25–26, 73–74).[6]

The Company supported the Association during the reorganization period by executing a collective-bargaining agreement with it and granting it gratuitous check-off privileges before the revised constitution had been ratified by the employees and while their continued adherence to the Association was being solicited (R. 175–177, 188–189; B. A. 21, 40–42, 48–50, 52–53, 58, 71–72, 73–74).

On February 1, 1936, the revised constitution went into effect, after having been ratified by the requisite number of Locals of the Association (R. 177; B. A. 21, 75). The officers of the Association continued in office and the Association's funds (the sum of $5,000 recently collected) continued in the same bank and under the same name as before (R. 177, 180; B. A. 13–14, 17, 26–27, 59).[7]

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[6] Subsequently, in 1940, after the Association had retained counsel, the recital of the constitution was changed so as to read that the Association was formed in "1935 * * * supplanting a former organization of employees by the same name" (R. 184–185; B. A. 86). Similarly, the minutes of the 1940 annual meeting refer to it as the "5th Annual Meeting," whereas the minutes of the annual meetings between 1936 and 1939 refer to the meetings as the "17th" to "20th Annual Meeting[s]" (R. 180, 185; B. A. 76, 77, 80, 81, 82).

[7] Prior to the reorganization, there being no office of treasurer, the Association secretary, Wilkes, deposited the money as acting treasurer; she continued in office after the reorganization as general secretary-treasurer and the new title was substituted in the account (R. 171, 177; B. A. 6, 26–27, 59).

Until 1937, the Company, following the course set forth in the memorandum distributed in 1935, continued to permit the Association free use of Company facilities and property for Association meetings and other business, and allowed Association representatives to meet together for some purposes during working hours without loss of pay (R. 177–178; Tr. 74–75, 180–181, 185, 187, 189, 346). In January 1937 and April 1937, the Company issued and distributed to the employees revised memoranda containing further "interpretations" of the Act, and pursuant thereto withdrew all remaining forms of financial support and assistance of the Association (R. 180–184, 189; C. A. 9–13, B. A. 46, Tr. 181–185, 189–195).

Late in 1940, the International Brotherhood of Electrical Workers, affiliated with the American Federation of Labor (hereinafter called the Union), began to organize the Company's employees at its Shreveport, Louisiana, office and established a local there (R. 191; B. A. 36–38). The long distance supervisor in that office, acting upon the suggestion of the District Traffic Manager that she "influence" her "people" against the Union (R. 191; B. A. 34–35), told two employees that they did not "need" the Union, that the Association was "everything that they had or could get," and that they could not "get any better than * * * they did out of the Association" (R. 191; B. A. 35). The General Traffic

Manager reprimanded the District Traffic Manager for this, but there is no showing that the reprimand was made known to the general body of employees (R. 191; C. A. 79). Some months later, the Employment Supervisor in the same office, referring to an employee who had joined the Union, declared that it was a "shame" the Company could not discharge its "dissatisfied" employees (R. 191–192; B. A. 30, 32–33).

On December 17, 1940, the Union filed a charge with the Board, and on January 15, 1941, an amended charge, which initiated these proceedings (R. 165; R. 27, 83). On February 10, 1941, the Association, having been informed that the Board was about to issue a complaint alleging that the Association was company-dominated in violation of the Act, wrote Company President Warren, referring to the imminent Board action and stating that "because such a charge clouds this Association's right to represent the employees of the Company * * * the Association will not undertake to act as their collective bargaining agent pending a canvass of its membership by signed ballot" (R. 185–186; B. A. 88–89). On February 11, 1941, Warren replied, "It is noted that, pending a canvass of your members, you will not undertake to represent the employees of this Company as their collective bargaining agent" (R. 186, 187; B. A. 90).

The Association thereupon conducted a signed poll of its members to determine whether they de-

sired to "continue" their Association membership and whether they wished the Association to represent them (R. 186, 189; R. 68–69, 70–75). Meanwhile, the Company posted notices on its bulletin boards setting forth the employees' rights under the Act and asserting the Company's neutrality with respect to union organization, and it issued corresponding instructions to its supervisory staff (R. 186, 189; R. 41–43, B. A. 47, 91–92, C. A. 72–73). A large majority of the employees voted "yes" to each question propounded on the signed ballot (R. 186, 189–190; R. 77–79). Thereupon, on March 6, 1941, the Company recognized the Association as the "authorized collective bargaining agent" and resumed bargaining relations with it pursuant to the existing exclusive bargaining contract dated July 30, 1940, which was not regarded as having been cancelled by the above-mentioned exchange of letters on February 10 and 11, 1941 (R. 187, 185; B. A. 51, 48, 87, 96).

Upon the foregoing facts, the Board found that "the Association, which originated in 1919, continued after the effective date of the Act, substantially unchanged, and not only without any 'line of fracture,'[8] but without so much as a change in name" (R. 188). The Board found, further, that in the absence of an "explicit announcement" to the employees that the Company "would no longer

[8] Citing *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. (2d) 657, 659 (C. C. A. 2), affirmed 312 U. S. 660.

recognize or deal with the Association," the effect of the Company's prior domination and support of the Association had not been dissipated and the employees had not been "afforded the opportunity to start afresh in organizing * * * which they must have if the policies of the Act are to be effectuated"; it found accordingly that the employees' choice of the Association did not reflect a free choice (R. 189–190).

The Board concluded that the Company had dominated, interfered with, and supported the Association in violation of Section 8 (2) of the Act, and had engaged in interference, restraint, and coercion in violation of Section 8 (1) (R. 190–191, 192). The Board's order directed the Company to cease and desist from its unfair labor practices and, as affirmative action which the Board found would effectuate the policies of the Act, to withdraw recognition from and completely disestablish the Association as collective bargaining representative of its employees and to post notices of compliance throughout all the Company's offices (R. 193, 195–196).

Thereafter, the Company and the Association filed separate petitions in the court below to review and set aside the Board's order (R. 1–4, 10–20). The Board answered, requesting enforcement of its order against the Company (R. 6–8, 22–26). On June 30, 1942, the court handed down its opinion and entered its judgments setting aside the Board's order in its entirety (R. 202–211).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that the following findings of the Board were supported by substantial evidence and were therefore conclusive under Section 10 (e) and (f) of the Act:

(a) That the Company dominated, interfered with, and supported the Association, in violation of Section 8 (2) of the Act;

(b) That thereby and in other ways the Company engaged in interference, restraint, and coercion in violation of Section 8 (1) of the Act.

2. In holding that the Board could not find that a labor organization, which was a revision of an admittedly company-dominated union which was never disestablished, was unlawfully dominated and supported.

3. In setting aside and denying enforcement to the Board's order.

REASONS FOR GRANTING THE WRIT

1. The court below correctly stated the Board's position to be (R. 207–208)—

> that the Association was and remained tainted and could not represent the employees because there had been no sufficiently clean break away from the old, to establish a new Association, by a complete dissolution and abandonment of the old and a fresh start from scratch.

The court held, however, that "the statute prescribes no such formula" (R. 208), and that the case should be considered (R. 209)—

> from the standpoint of the effect of the evidence to establish that at the time of the complaint and hearing, the Association was dominated or fostered by the company, and there was therefore not a free choice of the employees. * * * .

The court further held that even if the Association had not been purged of company support the Board's order would still be an abuse of discretion because a majority of the employees had chosen the Association as representative.

The test applied by the Board but rejected by the court below has been repeatedly approved by this Court. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584; *Westinghouse Electric & Manufacturing Co.* v. *National Labor Relations Board*, 312 U. S. 660, affirming 112 F. (2d) 657 (C. C. A. 2).* In the present case an association which originally was company dominated and supported has continued* as the repre-

*Respondent denies that the present Association is a continuance of the original unlawful organization, and the court below stated that it was clear under the proof that "the old

sentative of the employees. As in the *Newport News* case (308 U. S., at 248–250), by the time of the Court's decision there was no longer active support and interference by the company with the employees' rights under the Act. In that case the Court held that even though all management control had terminated, "the effects of the long practice cannot be eliminated and the employes rendered entirely free to act upon their own initiative without the complete disestablishment of the plan" (p. 250). The Board applied this principle here.

In this case the Company advised its employees of their rights under the Act and stated that it did not care what union they joined (*supra*, pp. 5–10). But throughout the entire period the Association was recognized as bargaining representative, and the Company never notified the workers that it was withdrawing recognition from or discontinuing the Association.[10] That such a definite repudiation is necessary in order to dissipate the effect of an employer's prior and long continued support is

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Association has been completely superseded by the present one, formed under a new constitution" (R. 207). The evidence summarized in the statement shows exactly the contrary, and provides ample support for the Board's finding. Instead of supersedure there was merely a revision of the constitution of the old association, with not even the name being changed. And the Association's officers were careful to advise the employees that the "new" association was merely a continuance of the old. See pp. 6–7, *supra*.

[10] The statement by the Company in 1941 that it "noted" that the Association would not "undertake" to act as collective bargaining agent "pending a canvass" of its members (*supra*, pp. 9–10) obviously did not constitute withdrawal

clear under the cases cited above.[11] The *Westinghouse* case, in particular, is closely in point. There the employer had announced in a speech to the old elected representatives that the original plan was to be discontinued, but failed to make any such disclosure to the employees as a whole. The absence of any such public repudiation of the plan was deemed controlling by the Circuit Court of Appeals. Its opinion states (112 F. (2d), at 660):

> * * * the company did not make any effort to make it plain to the employees generally that the "Independent" was not a revision, or amendment, of the "Plan". On the surface it seemed to be such, for it emanated from the old elected representatives, and that alone established an appearance of continuity between the two. * * *

The refusal of the court below to apply these principles conflicts with the above decisions. In addition, the criterion which the court did apply is plainly insupportable. For it would require the Board to find active domination and interfer-

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of recognition or repudiation of the Association by the Company. Although the Association did not bargain collectively during the 24-day period, the pre-existing contract remained in force (*supra*, p. 10), and the letters exchanged between the Association and the Company indicated on their face that relations would be resumed upon completion of the poll. Despite respondent's contention to the contrary, it is plain there was no definite or permanent severance of relationship at this, or any other, point.

[11] In *E. I. du Pont de Nemours & Co.* v. *National Labor Relations Board*, 116 F. (2d) 388 (C. C. A. 4), certiorari denied, 313 U. S. 571; *A. E. Staley Manufacturing Co.* v.

ence exerted at the time of the complaint and hearing before entering a disestablishment order.[12] The test adopted by the court below would deprive the Board of its recognized power to infer that continuance as the bargaining representative of an organization once supported or dominated by the employer gives that organization "a marked advantage over any other" (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, supra,* at 267), and that its disestablishment as bargaining representative is essential if the complete freedom of the employees to choose their representative is to be restored.

2. The holding of the court below that the unlawful conduct of the employer must be continuing at the time of the complaint and hearing is also directly contrary to the language of the statute which empowers the Board to enter an order to cease and desist and to take affirmative action if it finds that the employer "*has engaged in* or is engaging in" an unfair labor practice (Section 10 (c)). *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.,* 304 U. S. 257, involving identical language in the Federal Trade Commis-

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National Labor Relations Board, 117 F. (2d) 868 (C. C. A. 7); *Humble Oil & Refining Co.* v. *National Labor Relations Board*, 113 F. (2d) 85 (C. C. A. 5), and *Magnolia Petroleum Co.* v. *National Labor Relations Board*, 112 F. (2d) 545 (C. C. A. 5), relied on by respondent, there was a definite and public repudiation of the unlawful association as a bargaining agency.

[12] The *Newport News* and *Westinghouse* cases are in conflict with the decision below on this point also. Further-

sion Act, is directly in point and in conflict with the decision below.[13]

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

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OCTOBER 1942.

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more, in those cases the fact that the inside union at all times had a majority of employees as members was deemed immaterial. Yet, in the instant case, the court held that choice of the Association by a majority of the employees precluded disestablishment. Compare *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453; *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282.

[13] The same erroneous theory was given effect by the court below in *National Labor Relations Board* v. *Goodyear Tire & Rubber Co.*, 129 F. (2d) 661, in which it is anticipated that a petition for certiorari will be filed.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
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> * * * * *
>
> SEC. 10. * * *
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair

labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall * * * be conclusive.

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